Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Rules Regarding	)	
the Pricing of Unbundled Network Elements	)	WC Docket No. 03-173
and the Resale of Service by Incumbent Local	)	
Exchange Carriers	)	

REPLY COMMENTS OF BROADVIEW NETWORKS, INC.; ESCHELON TELECOM, INC.; KMC TELECOM, INC.; MPOWER COMMUNICATIONS CORP.; NUVOX, INC.; SAGE TELECOM, INC.; TALK AMERICA, INC.; XO COMMUNICATIONS, INC.; AND XSPEDIUS COMMUNICATIONS LLC

John J. Heitmann
Randall W. Sifers
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
Tele: (202) 955-9600
Fax: (202) 955-9792
jheitmann@kelleydrye.com

Counsel for Broadview Networks, Inc.; Eschelon Teleom, Inc.; KMC Telecom, Inc.; Mpower Communications Corp.; NuVox, Inc.; Sage Telecom, Inc.; Talk America, Inc.; XO Communications, Inc.; and Xspedius Communications LLC

January 30, 2004

SUMMARY

In their comments, the ILECs blatantly ignore the Commission's steadfast commitment to retain a UNE pricing methodology that sets prices on the basis of the forward-looking cost of providing those UNEs by repeatedly calling for UNE prices to be based on what they covertly describe as "actual" forward-looking costs. The ILECs' approach is little more than a thinly veiled attempt to infuse the pricing rules with elements of embedded cost rate making, which this Commission and the Supreme Court have previously found is contrary to the statutory language.

The current TELRIC standard allows all parties to demonstrate what costs and network designs make sense for an efficient provider to incur in a competitive market. As we explained in our initial comments, the NPRM's focus on "real-world" attributes is best limited to the *involuntary* real-world physical constraints that any carrier would actually face in making decisions concerning entry, pricing and investment, when such impediments cannot be overcome. As our experts explain, many existing TELRIC studies already capture such real-world attributes of network routing and topography.

In stark contrast, the ILECs' proposal – which relies on a combination of ILEC embedded network information reflecting old engineering guidelines and equipment limitations, ILEC short-run plans, and ILEC information purported to be "actual" expense data – would lock in existing network inefficiencies that the 1996 Act was designed to eliminate and result in higher retail prices that consumers would have to pay. Moreover, not only is the ILECs' proposal fundamentally inconsistent with forward-looking pricing principles, it also would effectively shut non-ILEC parties out of the process of establishing UNE costs by declaring that the necessary data for developing UNE costs are exactly whatever data the ILECs have about "actual" expenses, "actual" network design, and "actual" network plans. As our experts explain,

ILEC cost studies are typically based on unexplained data extracted from unexplained and unexamined sources and rely upon internal witnesses to vouch for inputs supplied by ILEC subject matter experts who are rarely identified or made available for examination.

The ILECs' claim that being subject to price cap regulation should be regarded as making them presumptively efficient must be dismissed for numerous reasons. First and foremost, the ILECs uniformly offer no analysis to demonstrate that their operations are efficient. In fact, the ILECs' recent and ongoing announcements that they are finding ways to drastically reduce their operating costs belies any claim that "actual" costs are efficient.

Moreover, unresolved issues stemming from the Commission's not so long ago audits of the ILECs books of account, which found that the ILECs could not account for approximately $5 billion of the equipment, strongly cuts against adopting any presumption that ILEC records are reliable or that any determination could be made, based on those records, that their networks are efficient.

In conjunction with any move toward the use of more ILEC "actual" data, the Commission should impose firm requirements that the ILECs deliver their purported real-world data in a format that is auditable, verifiable and readily usable by all non-ILEC parties. This is critically important given the difficulty parties have encountered in state cost proceedings to date. Moreover, given that ILECs' typically do not use "actual" expense data in non-recurring cost studies, the Commission must reject the ILECs' claims that the proper measure for non-recurring costs is the actual out-of-pocket costs that ILECs incur to make UNEs available to CLECs. Finally, given that there is no basis in fact for presuming that the ILEC's actual achieved fill factors are indicative of the utilization rates that an efficient carrier would achieve

in the long run, as demonstrated herein, the Commission should find that a UNE cost study should only include the spare capacity attributable to current demand for the element being studied and should exclude the cost of growth spare capacity.

Finally, BellSouth's request that the Commission clarify that TELRIC should only apply to interconnection for the exchange of "local traffic" (read: telephone exchange service and not exchange access) does not comport with the statute. In fact, the Commission rejected the argument in the *Local Competition Order* and it must do so again.

TABLE OF CONTENTS

EXHIBITS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Rules Regarding	)	
the Pricing of Unbundled Network Elements	)	WC Docket No. 03-173
and the Resale of Service by Incumbent Local	)	
Exchange Carriers	)	

REPLY COMMENTS OF
BROADVIEW NETWORKS, INC.; ESCHELON TELECOM, INC.; KMC TELECOM, INC.; MPOWER COMMUNICATIONS CORP.; NUVOX, INC.; SAGE TELECOM, INC.; TALK AMERICA, INC.; XO COMMUNICATIONS, INC.; AND XSPEDIUS COMMUNICATIONS LLC

Broadview Networks, Inc. ("Broadview Networks"), Eschelon Telecom, Inc. ("Eschelon"), Mpower Communications Corp. ("Mpower"), NuVox, Inc. ("NuVox"), Sage Telecom, Inc. ("Sage"), Talk America, Inc. ("Talk"), XO Communications, Inc. ("XO"), and Xspedius Communications LLC ("Xspedius"), (collectively, the "CLEC TELRIC Coalition"), through counsel, hereby submit into the record these joint reply comments, including the attached Declaration of Terry L. Murray and D. Scott Cratty[1] in the above-captioned proceeding (hereinafter, the "*Murray-Cratty Reply Declaration*").[2]

---

[1] The *Murray-Cratty Reply Declaration* is attached hereto as Exhibit 1.

[2] Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers, *Notice of Proposed Rulemaking*, 18 FCC Rcd. 18945 (2003) ("*NPRM*").

I. APPENDING "ACTUAL" TO "FORWARD-LOOKING COSTS" IS NOTHING MORE THAN A COVERT ATTEMPT TO INFUSE THE UNE PRICING RULES WITH EMBEDDED COST RATEMAKING

The ILECs, in their comments,[3] seek to significantly expand the *NPRM's* limited tentative conclusion (that UNE rates should more closely account for the real-world attributes of the ILEC network routing and topography) by proposing that the Commission require that UNE rates account for the actual characteristics of the existing ILEC networks, which the ILECs' characterize as "actual" forward-looking costs. The ILECs' approach is little more than a thinly veiled attempt to infuse the pricing rules with elements of embedded cost rate making, which is contrary to the statutory language.[4] As this Commission explained when its addressed the exact same argument in the *Verizon* case,

> The incumbents appear to be proposing a methodology based on the "actual" cost, in today's market, of duplicating "actual" existing networks in all physical particulars – or stated differently, the "application of up-to-date prices to out-of-date properties."[5]

This Commission, and the Supreme Court, rejected such an approach as essentially an embedded cost methodology that would produce UNE rates that reflect inefficient or obsolete network design and technology and result in higher retail prices that consumers would have to pay.[6] The 1996 Act was intended to bring tangible benefits to consumers and UNE pricing in

---

[3] *See, e.g.*, SBC Comments at 33; Verizon Comments at 25; BellSouth Comments at 2; Qwest Comments at 15.

[4] *See* 47 U.S.C. § 252(d)(1)(A).

[5] Reply Brief for Petitioners United States and the Federal Communications Commission at 6-7 (July 2001) (*citing* James C. Bonbright *et al.*, *Principles of Public Utility Rates* 294 (1988)).

[6] *See* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, 11 FCC Rcd. 15499, 15848 (¶ 684) ("*Local Competition Order*"). In *Verizon*, the Supreme Court found that:

particular was intended to make portable to consumers the benefits of the ILEC scale and scope,[7] benefits that continue to accrue to every ILEC investment to this day. The Commission must not in this proceeding modify its pricing rules in a manner that effectively deprives consumers of these benefits.[8]

As this Commission understands, actual costs (*i.e.*, historical or embedded costs) are fully distinct from forward-looking costs. Actual costs are the costs that the ILECs incurred in the past and that should be recorded in the ILECs' books of account.[9] In any event, as Murray and Cratty explain, the ILECs themselves admit that these figures are highly unreliable.[10] These costs do not reflect the current costs to produce the network elements. This is because they do not reflect the current prices of inputs used in the production of the network elements nor are they calculated using the most efficient currently available technology. Moreover, pricing methods that are based on actual costs are an integral part of rate-of-return regulation, which the 1996 Act explicitly disavows.[11] By contrast, forward-looking costs, by definition, do not

---

> As for an embedded-cost methodology, the problem with a method that relies in any part on historical cost, the cost the incumbents say they actually incur in leasing network elements, is that it will pass on to lessees the difference between most-efficient cost and embedded cost. . . . If leased elements were priced according to embedded costs, the incumbents could pass these inefficiencies to competitors in need of their wholesale elements, and to that extent defeat the competitive purpose of forcing efficient choices on all carriers whether incumbents or entrants. The upshot would be higher retail prices consumers would have to pay.
>
> *Verizon v. FCC*, 535 U.S. 467, 511-512 (2002).

7 *Local Competition Order* ¶ 679

8 *See Murray-Cratty Reply Declaration* ¶ 16.

9 *See* 47 C.F.R. § 51.505(d)(1).

10 *See Murray-Cratty Reply Declaration* ¶ 57.

11 As the Supreme Court observed in *Verizon*, "the FCC would have had some more explaining to do if it had not changed its course by favoring TELRIC over forward-looking methodologies tethered to actual costs, given

replicate actual past outlays which are recorded in regulatory books of account. Rather, forward-looking costs are based on what it will cost to construct a network that is efficiently designed, from an economic and technologic standpoint.

The real-world attributes of network routing and topography, which are contemplated by the tentative conclusion, include the costs imposed by the *involuntary* real-world physical constraints that any carrier would actually face in making decisions concerning entry, pricing and investment, when such impediments cannot be overcome. As experts Murray and Cratty explained in their declaration accompanying the CLEC TELRIC Coalition Initial Comments, many existing TELRIC studies already capture such topographical features with a high degree of reality.[12]

By contrast, the "actual" network routing reported in ILEC records reflects decades of decisions rendered in a monopoly environment that are not at all affected by more recent decisions, and presumably are not efficient. Further, as experts Murray and Cratty explained, the data ILECs have are often inconsistent and extremely complicated to use in modeling.[13]

Congress's clear intent to depart from past rate setting statutes in passing the 1996 Act." *Verizon*, 535 U.S. at 503 n.20.

[12] *Murray-Cratty Initial Declaration* ¶¶ 74, 82.

[13] *Id.* ¶ 96, stating that, for example,

> ILECs may have extremely detailed data in their engineering databases concerning engineering special service loops, but not have data or only sketchy data concerning the address at which that loop actually terminates. The exact opposite may be true for a standard consumer market basic exchange loop. Based on ILEC studies presented to date, ILECs often have no mechanized detail concerning their distribution facilities, have data that mixes existing plant with engineering plans for future/ultimate plant, have no information on how much of their plant is actually shared with other utilities or carriers, have databases that reflect multiple feeder and interoffice cables but cannot identify which are obsolete or were long ago fully depreciated, and that may not clearly differentiate which facilities are used for basic UNE loop-type services and which are "overlay" facilities supporting packet services or other facilities that may never be unbundled.

Thus, because the actual embedded ILEC network reflects old engineering guidelines and equipment limitations, it is difficult to imagine any definition of forward-looking costs that could be stretched widely enough to justify the use of such "real-world" ILEC network characteristics as representing reasonable cost study inputs. There simply is no assurance that ILEC network routing decisions bear any relationship to an efficient, forward-looking network deployment or that their data regarding network deployment can presumed to be any more real-world than the data in current TELRIC studies.

Moreover, as experts Murray and Cratty explained, neither ILECs nor CLECs appear to have data at a sufficient level of detail to identify the circumstances under which plant must be rerouted to avoid potential obstacles.[14] To the extent that such data even exists, "it is typically unaudited, ill-adapted for use in cost modeling and subject to interpretation."[15]

The issue that must be addressed in this proceeding is not whether the "real world" should be accounted for in UNE rates. The issue is whether it is appropriate to allow the ILECs to account for the actual costs of their networks (to the extent even known) that result from voluntary decisions made in the past under a regulated monopoly framework which protected the ILECs against competitive entry and for which there is no basis for assuming that the decisions were efficient.

The ILECs' proposal to use the costs of actual existing networks, with embedded conditions, technology and historical cost information, is contrary to the statutory mandate and

---

[14] *Murray-Cratty Initial Declaration* ¶ 77; *see also id.* ¶ 80 (stating that "no ILEC has ever offered to provide sufficient data to establish, on average, the route distance required for loop plant deployed in the 'real-world,' including whatever obstacles actually exist"); ¶ 81 (stating that "no ILEC has actually attempted to show that TELRIC study assumptions do not, on average, adequately or more than adequately compensate for such obstacles by, for example, building extra distance into every route using a rectilinear routing assumption").

[15] *Id.* ¶¶ 73, 96; *see also Murray-Cratty Reply Declaration* ¶¶ 32-39, 40-62.

fundamentally inconsistent with forward-looking pricing principles. Adopting UNE rates that enable ILECs to recover uneconomic costs, which would occur under the ILEC plan, will lead to prices that overstate economic costs, send inefficient entry signals, and drive up consumer rates.

Perhaps most remarkable about the ILECs' comments, is that they restate exactly the same arguments that they have made over the past seven years. Every ILEC argument raised already has been duly considered and rejected, both by this Commission and the Supreme Court; which begs the question: Just how many more of this Commission's and parties' resources should the ILECs be allowed to drain?

II. THE FCC MUST REJECT THE ILECS' PROPOSAL TO PRESUME THAT ILEC NETWORKS ARE EFFICIENT

The Commission must reject the ILECs' proposal to presume that ILEC networks are efficient because any approach that establishes the prices for access to network elements directly on the costs of the ILECs' regulated books of account would be pro-competitor (*i.e.*, pro-ILEC) rather than pro-competition, and thus inconsistent with the pricing provisions of the 1996 Act. Moreover, as our experts explain, adopting such a presumption would effectively shut non-ILEC parties out of the process of establishing UNE costs by declaring that the necessary data for developing UNE costs are exactly whatever data the ILECs have about "actual" expenses, "actual" network design, and "actual" network plans.[16]

A. Being Subject to Price Cap Regulation Does Not Ensure that the ILECs Have Been or Are Currently Operating as an Efficient Competitor Would in a Truly Competitive Market

The Commission and some state commissions began regulating the ILECs through price cap regulations in the pre-1996 Act regulatory environment. In part, the adoption

[16] *See Murray-Cratty Reply Declaration* ¶ 19.

of price caps was done to provide incentives for ILECs to act efficiently. However, contrary to the ILECs' contentions,[17] being subjected to price cap regulation does not mean that an ILEC has been or is currently operating as an efficient competitor would operate in a truly competitive market.

As experts Murray and Cratty explain, there are a number of reasons for rejecting the ILECs' claim that being subjected to price cap regulation presumptively results in efficient operations.[18] First, the ILECs uniformly offer no analysis to demonstrate that their operations are in fact efficient. Second, the ILEC claim that their "actual" costs are efficient is contradicted by their recent and ongoing announcements that they are finding ways to drastically reduce their operating costs. Third, adopting a presumption that the ILECs' actual costs are efficient would create a price umbrella under which the ILECs could protect certain inefficiencies that the 1996 Act intended to eliminate and produce UNE rates that reflect inefficient or obsolete network design and technology and result in higher retail prices that consumers would have to pay. Finally, in addition to creating an opportunity for more efficient operations, price caps also create opportunities for an ILEC to game its accounting practices by shifting certain reported costs to regulated operations and away from non-regulated operations.

---

[17] *See, e.g.*, SBC Comments at 26-27; Verizon Comments at 26-27; BellSouth Comments at 19; Qwest Comments at 21-22.

[18] *Murray-Cratty Reply Declaration* ¶¶ 68-73.

B. There Are Substantial Reasons to Presume that the ILEC Books of Account Are Overstated, Which Strongly Cuts Against Adopting Any Presumption that the ILEC Records Are Reliable or that Their Networks Are Efficient

There are questions, which remain unanswered, concerning whether using information from the ILECs' books of account would overstate the cost of UNEs. As noted in the *NPRM*, the Supreme Court called into question whether historical costs were accurate.[19]

In 1997, Commission auditors conducted audits of the largest ILECs to determine if their records were being maintained in compliance with the Commission's rules and to verify that property recorded in their accounts represented equipment used and useful for the provision of telecommunications services.[20] Specifically, the Commission's auditors examined certain categories of central office equipment reflected on the property records books, and made field visits to selected locations where the auditors asked company personnel to identify randomly chosen items from the account records. In a substantial number of instances, the property could not be found, and no records adequately documenting that the equipment had been purchased, much less deployed and then retired, were identified. In each of the audit reports, the auditors reported that the ILECs had not maintained their basic and continuing property records in a manner consistent with the Commission's rules. The audits found that, combined, these carriers

---

[19] *NPRM* ¶ 40. *Verizon*, 535 U.S. at 512 ("[T]he temptation would remain to overstate book costs to ratemaking commissions and so perpetuate the intractable problems that led to the price-cap innovation."); *id.* at 517-18 ("the 'book' value or embedded costs of capital presented to traditional ratemaking bodies often bore little resemblance to the economic value of capital"); *id.* at 518 ("[B]ook costs may be overstated by approximately $5 billion." (quoting FCC Releases Audit Report on RBOCs' Property Records, Public Notice, Report No. CC 99-3 (released Feb. 25, 1999)).

[20] *See* Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit, Bell Atlantic (North) Telephone Companies' Continuing Property Records Audit, Bell Atlantic (South) Telephone Companies' Continuing Property Records Audit, BellSouth Telecommunications' Continuing Property Records Audit, Pacific Bell and Nevada Bell Telephone Companies' Continuing Property Records Audit, Southwestern Bell Telephone Company's Continuing Property Records Audit, US West Telephone Companies' Continuing Property Records Audit, *Notice of Inquiry*, 14 FCC Rcd. 7019 (¶ 1) (1999).

could not account for approximately $5 billion of central office equipment.[21] The audit reports indicated that such record keeping could improperly inflate costs and thus impact the prices charged by the ILECs.[22] In exchange for the Commission's termination of its audit investigation, the ILECs agreed to a significant reduction and restructuring in interstate access charges.[23] Although it decided not to pursue further investigation into the audits or make further decisions concerning the findings stated in the audits, the Commission nonetheless stated that "it remained concerned about the poor record keeping that the audits revealed"[,] . . . . "which the [ILECs] did not seriously challenge."[24] The Commission's explicit concern about the accuracy of the ILECs' record-keeping provides a sufficiently compelling reason to reject any presumption that the ILEC records are reliable or that any determination could be made, based on those records, that their networks are efficient.

Additionally, it was recently reported that a software program used by Verizon to compile crucial service reports, contained basic flaws that rendered certain reporting to the FCC

---

21 *See* 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers, CC Docket No. 98-137, Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit, *et al*., CC Docket No. 99-117, GTE Telephone Operating Companies Release of Information Obtained During Joint Audit, AAD File No. 98-26, *Further Notice of Proposed Rulemaking*, 15 FCC Rcd. 6588, 6594 (¶ 15) (2000).

22 *See* 1998 Biennial Regulatory Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers, CC Docket No. 98-137, Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit, *et al*., CC Docket No. 99-117, GTE Telephone Operating Companies Release of Information Obtained During Joint Audit, *Second Report and Order in CC Docket No. 99-137 and Order in CC Docket No. 99-117 and AAD File No. 98-26*, 16 FCC Rcd. 4083, 4090 (¶ 10) ("*Audit Investigation Second R & O*").

23 Access Charge Reform, *Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45*, 15 FCC Rcd. 12962 (2000) ("CALLS Order"), *reversed and remanded in part, Texas Office of Public Utility Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *on remand*, 18 FCC Rcd. 14976 (2003).

24 *See Audit Investigation Second R & O*, 16 FCC Rcd. 4091 (¶¶ 12-13).

inaccurate since February 2000, apparently, almost always in Verizon's favor.[25] While this alleged inaccuracy does not relate specifically to information that would affect the pricing of UNEs, it nevertheless, provides further evidence of the difficulty that Verizon apparently still has in maintaining accurate records about its network.

C. The Commission's Work to Implement the Pricing Provisions of the Act Would Become a "Wasted Effort" If Embedded Costs Were to Be Used

In passing the 1996 Act, Congress moved to restructure the local telecommunications exchange market so as to remove the most significant economic impediments to efficient entry that existed under the monopoly framework. To offset the economies of scale and network externalities that inhibited efficient entry of competitors into the local exchange markets, Congress required the ILECs to offer interconnection and network elements on an unbundled basis. Congress further recognized that the duties imposed on the ILECs would only be meaningful if limitations were placed on the rates that could be charged because, without such limitations, the ILECs would offer access to unbundled elements at rates that would perpetuate the ILECs' market power. To constrain the ILECs' ability to perpetuate their market power through the pricing of interconnection and access to unbundled elements, Congress required the Commission to develop a pricing methodology that departed from past rate setting procedures so as to allow entry where it can occur efficiently.

Since the existing ILEC networks were initially built under a monopoly framework and over a period of decades, they must, by definition, reflect inefficient and obsolete network designs and technologies. It would therefore be illogical, under any circumstance, to

[25] *See* Mark Harrington, Verizon Software Had Flaws, Newsday.com (Oct. 14, 2003), attached hereto as Exhibit 2.

adopt a presumption that the ILEC networks are efficient. Nevertheless, in the event that such illogical presumption is adopted, it must necessarily follow that it is reasonable to base UNE rates on embedded costs. If it is reasonable to base UNE rates on the existing ILEC network, as reflected in the ILEC books of account, then it must be that Commission's efforts to develop a pricing methodology to implement the 1996 Act's pricing provisions were a wasteful and unnecessary endeavor.

III. RECOMMENDATIONS ON INPUTS

As a general matter, in conjunction with any move toward the use of more ILEC "actual" data, the Commission should impose firm requirements that the ILECs must deliver the purported "real-world" data in a format that is auditable, verifiable and readily usable by all non-ILEC parties well in advance of any cost proceeding. Such requirements are particularly important given the difficulty parties have encountered in state cost proceedings. As our experts explain, the ILECs typically present cost studies based on unexplained data extracted from unexplained and unexamined databases and rely upon internal "regulatory department" witnesses to vouch for inputs supplied by ILEC subject matter experts who are rarely identified or made available for examination.[26] Simply obtaining usable input data from the ILECs is a process that has taken months of negotiation.[27]

[26] *See Murray-Cratty Reply Declaration* ¶ 24.

[27] *Murray-Cratty Initial Declaration* ¶ 95.

A. The Commission Must Reject the ILECs' Claim that the Proper Measure for Non-Recurring Costs is the Actual Out-of-Pocket Costs that ILECs Incur to Make UNEs Available to CLECs

Non-recurring charges ("NRCs") are significant because they represent an up-front cost of doing business that CLECs will incur in conjunction with each customer they win from the ILEC. These NRCs increase the capital that a CLEC must invest up-front before receiving any revenue from its retail customer and therefore makes entry more difficult. Thus, to create the conditions under which local competition can flourish, NRCs must not exceed the forward-looking, efficient level necessary to compensate the ILEC for the costs that the CLEC truly causes the ILEC to bear. The ILECs have every incentive to make NRCs an even larger barrier to entry than they would otherwise be by exaggerating the level of non-recurring cost associated with the preordering, ordering, and provisioning of UNEs. Therefore, as the CLEC TELRIC Coalition explained in its Initial Comments, the proper measure for determining whether a cost should be recovered as an NRC is whether the cost, once incurred, can be used to supply service to another customer.[28] If the facility can be reused to provide service to another customer, then the ILEC should recover the cost through recurring charges, not NRCs. Such an approach is particularly appropriate in this environment in which ILECs often "win back" new CLEC customers, often before the cutover is completed.

Moreover, as our experts explain, ILECs' typically do not use "actual" expense data in non-recurring costs studies.[29] Because such data apparently are not available, the ILECs instead rely on information provided by ILEC subject matter experts, employee observations and

[28] *See* CLEC TELRIC Coalition Comments at 85.

[29] *See Murray-Cratty Reply Declaration* ¶¶ 43-49.

employee surveys to develop task samples.[30] Thus, the Commission must reject ILEC claims that the proper measure for NRCs is the ILECs' actual out-of-pocket costs.

Further, the CLEC TELRIC Coalition strongly opposes the ILECs' self-serving proposal that they should be allowed to recover non-recurring costs before they actually are incurred.[31] For example, a CLEC should not be required to pay disconnect charges at the time it pays for connection of a new UNE because the ILEC does not incur the cost of disconnection until and unless a facility is disconnected and will never incur the disconnection cost when the ILEC "wins back" the customer prior to the cutover.[32] Moreover, the practice (and alleged right to recovery) is questionable because the facilities often are not physically disconnected when service is terminated.[33] Moreover, recovering disconnection costs through up-front non-recurring charges raises needless time value of money issues because the length of the period between connection and disconnection is uncertain.

B. The Commission Must Reject the ILECs' Proposal to Use Actual ILEC Fill Factors

In their comments, the ILECs argue that fill levels should reflect the actual fill in their existing networks.[34] As explained in Murray's recent essay, there is no basis in fact for the presumption that the ILECs' actual achieved fill factors are indicative of the utilization rates that

---

30 *Id.*

31 *See, e.g.*, SBC Comments at 84; Verizon Comments at 81.

32 *See Murray-Cratty Reply Declaration* ¶ 21.

33 For example, when a residential customer deactivates a main line, the line commonly remains active on a limited basis so that the new resident can order service or call 911.

34 *See, e.g.*, SBC Comments at 64; Verizon Comments at 43-44; BellSouth Comments at 27; Qwest Comments at 43.

an efficient carrier would achieve in the long run.[35] As Murray explains, the determination of the appropriate fill factor to be used in a UNE cost study requires careful consideration, and appropriate treatment, of the various types of space capacity.[36] Murray considered the proper treatment of costs for three types of spare capacity: (1) allowances for "buffer" needs (*i.e.*, churn and damaged equipment); (2) breakage;[37] and (3) growth. Murray found that while the need for spare capacity for breakage is virtually unavoidable, an efficient carrier would use that spare capacity to accommodate other needs such as its requirements for buffer needs.[38] Murray also found that the cost of spare capacity to meet most growth needs is not attributable to current demand and it should not be attributed to current UNE subscribers.[39] Murray concludes that there is little or no justification for including the cost of spare capacity beyond the spare required to meet buffer needs related to churn and maintenance, especially when the extra spare capacity that results from breakage is considered.[40] Based on these considerations, the CLEC TELRIC Coalition urges the Commission to find that a UNE cost study should only include the spare capacity attributable to current demand for the element being studied and should exclude the cost of growth spare capacity.

---

[35] Terry L. Murray, Utilization or Fill Factors in TELRIC (filed Dec. 8, 2003, in WC Docket No. 03-173) ("*Murray Essay*").

[36] *Id.* at 6.4.

[37] The difference between the capacity needed to meet a given level of demand and the capacity of the smallest available piece of equipment that could serve that demand is known as breakage.

[38] *Murray Essay* at 6.11.

[39] *Id.* at 6.5. *See also Murray-Cratty Reply Declaration* ¶¶ 63-67 for discussion of how low calculated fill results from unrealistic assumptions about an ILEC's actual practices rather than any real-world constraint.

[40] *Id.* at 6.20.

C. The Commission Must Not Extend the Burden of Proof Approach Adopted in the *Triennial Review Order* to the UNE Rate Proceedings

In its comments, Qwest proposes that the Commission extend to UNE rate proceedings the approach to burden of proof adopted in the *Triennial Review Order*.[41] In the *Triennial Review Order*, the Commission declined to adopt a burden of proof approach that placed on either ILECs or CLECs the onus to prove or disprove the need for unbundling.[42] Instead, the Commission determined that actual marketplace evidence, when presented at a high degree of granularity, was the most persuasive and useful evidence.

As a preliminary matter, Qwest fails to explain how the approach adopted for proving whether unbundling is necessary in a given market is relevant with respect to the burden of proof in proceedings to determine individual UNE rates. With regard to proving whether unbundling is necessary, needed evidence about actual marketplace conditions is not within the control of, or more accessible to, any single party. For example, one of the questions to be answered in the context of determining whether an element should be subject to unbundling is whether elements are available from sources other than the ILECs. It is clear that information of this nature is not within the control of the ILEC or CLEC. Therefore, it was reasonable for the Commission to not impose a burden or proof on any single party. In contrast, with regard to establishing UNE rates, the cost information required to compute prices is more accessible to the ILECs. Consistent with the case cited by Qwest,[43] wherein the burden of proof is appropriately

---

41 Qwest Comments at 64.

42 Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, FCC 03-36, ¶ 92 & n.307 (released Aug. 21, 2003) ("*Triennial Review Order*").

43 *United States v. N.Y., N.H. & Hartford R.R. Co.*, 78 S.Ct. 212, 214 n.5 (1957).

placed on a party other than the proponent where the other party controls or has better knowledge of the relevant facts or evidence, the Commission determined in the *Local Competition Order* that the burden of proof appropriately rests with the ILEC. Specifically, the Commission explicitly established that the ILEC bears the burden of providing any costs it seeks to recover through UNE rates –

> We note that incumbent LECs have greater access to the cost information necessary to calculate the incremental cost of the unbundled elements of the network. Given this asymmetric access to cost data, we find that incumbent LECs must prove to the state commission the nature and magnitude of any forward-looking cost that it seeks to recover in the prices of interconnection and unbundled network elements.[44]

Under Qwest's proposal, the ILECs would be able to meet the burden of proof requirement by simply showing that the information came from the ILECs' books of account. In contrast, the CLECs would be required to provide evidentiary support for each and every fact presented, a task which would be insurmountable. To shift the burden and expense onto the CLECs, given the tremendous information asymmetry, would be patently unfair, improper, and would have grossly anti-competitive effects that flow all the way to the consumer. Therefore, the CLEC TELRIC Coalition strongly urges the Commission to reject Qwest's proposal.

IV. THE COMMISSION MUST REJECT BELLSOUTH'S REQUEST THAT TELRIC SHOULD BE LIMITED TO INTERCONNECTION FOR THE EXCHNAGE OF "LOCAL TRAFFIC"

In its comments, BellSouth urges the Commission to declare that TELRIC should only apply to facilities that are used to exchange "local traffic."[45] In the *Local Competition Order*, the

[44] *Local Competition Order* ¶ 680.

[45] BellSouth Comments at 54.

Commission affirmed that a requesting carrier is entitled "under the statute to obtain interconnection pursuant to section 251(c)(2) for the 'transmission and routing of telephone exchange service and exchange access.'"[46] Indeed, the Commission specifically rejected the point of view – espoused by BellSouth – that cost-based interconnection is only for "local traffic" (a term by which BellSouth means "telephone exchange service") by determining that "parties offering only exchange access are permitted to seek interconnection pursuant to section 251(c)(2)."[47] Thus, a requesting carrier offering either telephone exchange service or exchange access – or both telephone exchange service and exchange access – is entitled to cost-based interconnection. In fact, the only instance under the 1996 Act and the Commission's rules where a requesting carrier is *not* entitled to cost-based interconnection is where the requesting carrier is *exclusively* an interexchange carrier ("IXC") and it "requests interconnection *solely* for the purpose of originating or terminating its *interexchange* traffic."[48] BellSouth's request that the Commission clarify that TELRIC should only apply to local traffic does not comport with the 1996 Act or the Commission's rules, and therefore, the Commission must reject it.

---

[46] *See Local Competition Order* ¶ 190 (quoting 47 U.S.C. § 251(c)(2)); *see also id.* ¶¶ 176, 184-85, 191.

[47] *Id.* ¶ 185.

[48] *Id.* ¶ 191 (emphasis added).

V. CONCLUSION

For all the foregoing reasons, the CLEC TELRIC Coalition submits the Commission should take such actions consistent with the comments presented herein.

Respectfully submitted,

By: /s/ John J. Heitmann

John J. Heitmann
Randall W. Sifers
Kelley Drye & Warren LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
Tele: (202) 955-9600
Fax: (202) 955-9792
jheitmann@kelleydrye.com

Counsel for Broadview Networks, Inc.; Eschelon Teleom, Inc.; KMC Telecom, Inc.; Mpower Communications Corp.; NuVox, Inc.; Sage Telecom, Inc.; Talk America, Inc.; XO Communications, Inc.; and Xspedius Communications LLC

January 30, 2004

CERTIFICATE OF SERVICE

I, Beatriz Viera-Zaloom, do hereby certify that on the 30th day of January, 2004, a copy of the foregoing Reply Comments of the CLEC TELRIC Coalition was served via electronic mail or by regular mail on the following:

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Judith B. Herman
Federal Communications Commission
Room 1-C804
445 12th Street, S.W.
Washington, DC 20554
judith-b.herman@fcc.gov

Jeanette Thornton
OMB Desk Officer
Room 10236 NEOB
725 17th Street, N.W.
Washington, DC 20503
jthornto@omb.eop.gov

/s/ Beatriz Viera-Zaloom
Beatriz Viera-Zaloom